



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 42 OF 2014**

**WILBERFORCE O. ODUOR.....PLAINTIFF**

**VERSUS**

**BENSON AKULA.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 12<sup>th</sup> February 2014 the plaintiff avers that he is the absolute owner of all that parcel of land LR No. N. Wanga/Lunganyiro/862 measuring 12.5 acres, designated on registry map No. 20. The defendant is a son of Ndeta Opondo the owner of land parcel LR. N. Wanga/Lunganyiro/863 of which the defendant is entitled, which land borders N. Wanga/Lunganyiro/862. The plaintiff acquired land parcel N. Wanga/Lunganyiro/862 from his father and upon complying with all legal and procedural requirements was duly registered and issued with the title deed on 30/10/2007. The defendant in October, 2013 or thereabout without the consent of the plaintiff, probable cause, unlawfully, illegally removed boundaries, then trespassed onto a portion of the plaintiff's aforesaid land and erected forcefully a house thereon, in the process destroyed the plaintiff's property. The plaintiff, the local administration/government and other officers have been unable to have the defendant move to his father's land LR. N. Wanga/Lunganyiro/863 and give vacant quiet possession to the plaintiff of LR. N. Wanga/Lunganyiro/862. The defendant has since October, 2013 or thereabout continued to trespass onto and unlawfully occupy and use a portion of the plaintiff's aforesaid land forcefully thereby denying the plaintiff quiet, peaceful possession and use of his land. The plaintiff avers the defendant has no beneficiary, purchasers or any other interest or right whatsoever in Land Parcel LR. N. Wanga/Lunganyiro/862. The defendant's continued use of a portion of the land is an act of trespass which continued to cause the plaintiff loss and damages. The plaintiff avers that he sued Ndeta Opondo at Matungu Land Dispute Tribunal, which led to Kakamega CMC Mis. Award No. 112/2008 which stalled due to a technicality. The Land Registrar has been reluctant to reinstate the boundaries due to this case and or lack of an order to that effect. The plaintiff's claim against the defendant is for eviction from Land Parcel LR. N. Wanga/Lunganyiro/862 and reinstatement of the boundary/beacons. The plaintiff prays for judgment against the defendant for;

- (a) An eviction order to evict the defendant, his family, agents/servants or any other person claiming on his behalf from Land parcel LR. N. Wanga/Lunganyiro/862.
- (b) An order directing the Land Registrar – Kakamega County to reinstate the boundary/beacons of Land Parcel N. Wanga/Lunganyiro/862.
- (c) Costs of this suit.

This court has carefully considered the evidence therein. The defendant was served but failed to attend court or defend the suit. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that

the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”*

It is a finding of fact that the plaintiff is the absolute registered owner of the parcel of land known as parcel of land LR No. N. Wanga/Lunganyiro/862 (PEx2 is a copy of the title deed). It is the plaintiff's testimony that the defendant is a neighbour on land parcel LR. N. Wanga/Lunganyiro/863 and in October, 2013 or thereabout without the consent of the plaintiff, probable cause, unlawfully, illegally removed boundaries, then trespassed onto a portion of the plaintiff's aforesaid land and erected forcefully a house thereon, in the process destroyed the plaintiff's property. His evidence has not been challenged. I find that the plaintiff is the proprietor of the land LR No. N. Wanga/Lunganyiro/862 and is the absolute and indefeasible owner and the title has not been challenged. I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. The Land Registrar and Land Surveyor Kakamega County to visit the suit land and reinstate the boundary/beacons of Land Parcel N. Wanga/Lunganyiro/862.
2. Should the defendant be found to have trespassed, defendant, his family, agents/servants or any other person claiming on his behalf are given six (6) months to vacate from Land parcel LR. N. Wanga/Lunganyiro/862 from the date of the said report and in default execution order to issue forthwith.
3. Each party to bear its own cost.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> JUNE 2019.**

**N.A. MATHEKA**

**JUDGE**